No. 85-791

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

PAUL O'DELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the district court erroneously admitted certain hearsay testimony and failed to instruct the jury properly on the necessity of finding guilt beyond a reasonable doubt.

1. Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on one count of conspiracy to possess with intent to distribute heroin, in violation of 21 U.S.C. 846, and on four counts of distributing heroin, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent 10-year terms of imprisonment on each count and to concurrent five-year special parole terms on the substantive counts.

The evidence at trial showed that petitioner was a central participant in a heroin distribution ring. To establish petitioner's role in the scheme, a government agent testified to a

number of incriminating statements made by petitioner's co-conspirators (Pet. App. A2). The agent also testified that, on several occasions, he had observed petitioner arrive at the site of a heroin transaction and converse with the dealer immediately prior to the transaction (Tr. 14, 206-207, 273-276); that he had seen a dealer obtain heroin from petitioner's car while petitioner was in the car (Tr. 23-25); that he had seen a dealer hand petitioner cash in exchange for heroin (Tr. 32-34); and that petitioner had arranged for a dealer to sell the agent a substantial quantity of heroin (Tr. 37-43).

Prior to trial, defense counsel objected to the introduction of the co-conspirator statements (Pet. App. C1). Pursuant to *United States* v. *Vinson*, 606 F.2d 149 (6th Cir. 1979), cert. denied, 444 U.S. 1074 (1980), however, the district court permitted the agent to testify to the statements. The court indicated that, if the government's case-in-chief proved the existence of a conspiracy by a preponderance of the evidence, it would allow the conspiracy count to go to the jury; if the evidence did not rise to that level, the court would declare a mistrial (Pet. App. C2-C3).

At the close of the government's case, the district court ruled that the government had established the existence of a conspiracy by a preponderance of the evidence and that the co-conspirator statements accordingly were admissible (Pet. App. C4). In response to defense counsel's inquiry whether it had relied on the disputed co-conspirator statements in finding that a conspiracy existed, the district court responded: "I heard sufficient evidence, sir, to determine that there is sufficient evidence of a conspiracy to admit the statements. I think that is the only finding I have to make" (*ibid.*)

2. The court of appeals affirmed in an unpublished opinion. The court rejected petitioner's invitation to reconsider the *Vinson* holding, noting that the Sixth Circuit had

repeatedly upheld use of the *Vinson* approach. Pet. App. A2 (citing *United States* v. *Taylor*, 657 F.2d 92, 93 (6th Cir.), cert. denied, 454 U.S. 1086 (1981); *United States* v. *Hamilton*, 689 F.2d 1262, 1269 (6th Cir. 1982), cert. denied, 459 U.S. 1117 (1983); *United States* v. *Hancock*, 703 F.2d 982, 983 (6th Cir. 1983); *United States* v. *Arnott*, 704 F.2d 322, 325 (6th Cir.), cert. denied, 464 U.S. 948 (1983)). The court of appeals also rejected petitioner's contention that the district court should have placed findings of fact about the existence of the conspiracy on the record, holding that petitioner had failed to preserve this objection (Pet. App. A2-A3). And the court of appeals concluded that the district court's jury instructions on reasonable doubt, when viewed as a whole, were adequate (*id.* at A3-A4).

3. Petitioner contends (Pet. 6-7) that this Court should grant the petition in this case to resolve an asserted conflict in the circuits on the question whether a district court may rely on the co-conspirator statements themselves when determining whether the existence of a conspiracy has been established by a preponderance of the evidence.[1] Petitioner fails to recognize, however, that the challenged statements here would have been deemed admissible in any circuit because the existence of a conspiracy—and petitioner's participation in it—was convincingly established by

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[1]In determining whether the existence of a conspiracy has been established by a preponderance of the evidence, and that co-conspirator statements therefore are admissible, the Sixth Circuit permits district courts to consider the challenged statements themselves. See *Vinson*, 606 F.2d at 153. A number of other circuits require district courts to find the existence of a conspiracy without regard to the hearsay. See, *e.g.*, *United States* v. *Regilio*, 669 F.2d 1169, 1174 (7th Cir. 1981), cert. denied, 457 U.S. 1133 (1982); *United States* v. *Nardi*, 633 F.2d 972, 974 (1st Cir. 1980); *Government of the Virgin Islands* v. *Dowling*, 633 F.2d 660, 665 (3d Cir.), cert. denied, 449 U.S. 960 (1980); *United States* v. *Macklin*, 573 F.2d 1046, 1048 n.2 (8th Cir.), cert. denied, 439 U.S. 852 (1978).

independent evidence. Petitioner was observed directly participating in at least one heroin transaction; he arranged a second transaction at an undercover agent's request; and he appeared to play a role in a number of other sales. There accordingly was no need for the district court to consider the statements made by the co-conspirators in this case.[2]

Petitioner's additional contentions do not warrant further review. His argument (Pet. 7) that the district court failed to make adequate findings on the record prior to admitting the co-conspirator statements is frivolous, given the strength of the evidence of conspiracy; in any event, his objection was not preserved. See Fed. R. Evid. 103(a)(1). Petitioner's challenge to the jury instructions (Pet. 8) similarly lacks merit. The district court explicitly charged the jury that "[t]he [d]efendant is not required to prove his innocence but the Government must establish his guilt beyond any reasonable doubt" (Pet. App. C7). The court of appeals accordingly found that the instructions, viewed as a whole, were not misleading; nothing in that factual conclusion deserves further consideration.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

APRIL 1986

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[2]Indeed, the district court did not make clear whether it in fact relied on the co-conspirator statements in making its admissibility determination.

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